REVIEWS

LATIN-AMERICAN LEGAL PHILOSOPHY. By Luis Recaséns Siches, Carlos Cossio, Juan Llambías de Azevedo, Eduardo García Máynez. Translated by Gordon Ireland, Milton R. Konvitz, Miguel A. de Capriles and Jorge Roberto Hayzus, with an introduction by Josef L. Kunz, Cambridge: Harvard University Press, 1948. Pp. 577. $6.00.

THIS volume, the third in the 20th Century Legal Philosophy series sponsored by the Association of American Law Schools, opens wide horizons to the practitioner who has had little opportunity to delve into modern, especially German, philosophy. It will acquaint him more readily than any other source with the intellectual achievements and the problems that are engaging attention in other parts of the world.

When we recall how difficult it is to arouse interest here even in our modest Jurisprudence, one is amazed at the pre-occupation of Latin Americans with philosophies of law in their most abstract form. Is it because they find their law so unsatisfactory, with constitutions so often scraps of paper, that they seek refuge in "that sweet milk of adversity, philosophy"? Whatever the reason, there is fervid interest in the subject and this volume is a small sample of the voluminous literature Latin American presses have been pouring out.

After a masterly introduction, three-fifths of the volume is a translation of a complete work of Recaséns Siches. It is not easy reading but well repays the trouble. An adherent, as are all the other authors, of philosophy of values, Recaséns first analyzes the place of law in the universe of the philosophers. All positive law, he believes, is an attempt to attain just law. Human life is the underlying basic reality, and must embody juristics—a self-evident precept the author thereafter seems to neglect. It is his theory that the content of positive law varies with time and place, but the function of the law is constant—security in social life. The subject of the law is never the real man of flesh and blood but only a personified mask, the citizen, the creditor, the buyer, etc. It is evident he never had to address a jury.

Carried to its conclusion, this theory of personality, largely derived from Kelsen, would mean that law is not made for men, but man is made by and hence for the law, since the law is identical with the state (Kelsen again). In other words, it leads to totalitarianism, which is thoroughly abhorrent to Recaséns and which he analyzes profoundly without being conscious of the inconsistency with his theory of law. Yet, what becomes of our inalienable rights under his theory of personality? Are we to give up the Bill of Rights in our quest for a theory of law? The Pure Law-State too readily becomes the Purge State.

Recaséns, however, does not implicitly follow Kelsen. Both he and the other authors engage in rectifications or criticisms of Kelsen, which will please those who have no great admiration for the Pure Theory of Law. His own theory Recaséns calls a superstructure on Kelsen's. One of the most inter-

esting parts of the book is the discussion of the nature of the State—which he considers a purely philosophical, not a legal, question. All forms of law (statutes, custom, case-law, regulations, the binding force of contracts) prevail only by authority of the State. At the head of the hierarchy stands the Constitution, the fundamental norm. The Constitution lies outside the strictly juridical. It has to be taken for granted. The "first" constitution, arising by revolution or when a new state is established, has no legal, but only historical and sociological foundations. And the deepest root of the juridical command is never material force, but support in public opinion and at least passive popular adherence. This, however, is inconsistent with his thesis of the inexorability of law.

According to Recaséns, compulsion is of the essence of law but compulsion is not enough. One must distinguish between law, with its inevitable regularity, and arbitrary commands. "It is peculiarly an essential characteristic of the juridical norm to control necessarily the very person who enacted it." This is simply our doctrine of the Supremacy of Law, better expounded by Dicey and Pound—a reality with us, merely nostalgia abroad. Nor is the author too successful in his attempt to differentiate the arbitrary mandate which is not law, from the permissible exercise of judicial and administrative discretion.

The final and lengthiest chapter of Recaséns' book is entitled *Juridical Valuation,* the problem of law "that ought to be." The concept of positive law is unrealizable without reference to an ideal of justice. Having justified the problem as intrinsically worth while, he discusses at great length four questions, and comes to the following conclusions:

1. The basic foundation of juridical valuation is not empirical but necessarily *a priori.* But he seems to give his case away when he admits that pure ideas of value are insufficient; they must be combined with experience. 2. The ideas for the valuation of the law are not subjective and psychological, but objective ideas with necessary validity. 3. He harmonizes the fulfilment of *a priori* ideas of juridical value with the process of history, but maintains that there are superior values, good for all times and places, which enjoy necessary preference, *i.e.,* human dignity, freedom of conscience, individual liberty. Legislative reformers must be more like doctors than physicists or engineers. To assure respect for the dignity of the person by creating order and security is the basic motivation for establishing rules of law. 4. The paradox that unanimous agreement on the theme of justice has been accompanied by the utmost diversity and bloody strife in the practical application of the idea of justice is due to the fact that the rule of harmonious equality and proportionality (our "equality is equity") does not in itself furnish a sufficient criterion. This point has been hitherto overlooked, and he believes his contribution will make for an advance in the future.

It is a relief to turn from Recaséns to Cossio. Cossio, although his language is even more abstruse, shows an underlying grasp of realities and quotes freely from codes and decisions. After all, he has been a practicing lawyer

and counsel for important banks. The only practical experience Recaséns seems to have had was as a member for a brief period of the Spanish Cortes under that Republican regime whose utter lack of a sense of reality was one of the contributing causes of its sad downfall. More Cossio and less Recaséns would have made a better balanced book and served to justify the title.

The purpose of Cossio's introductory exposition is to view the judicial decision from within as a living reality. Positive law alone is law, but the knowing subject is not a mere spectator; he introduces himself into the law to animate its meaning, to determine whether it is just or unjust. The valuation he makes is part and parcel of what he sees in the object valued.

This is most strikingly evident in the case of the judge as creator of the decision. He looks at the law from within with the logic of the "ought to be," contributing to its meaning and to its making as living human life. Every statutory provision is susceptible of more than one interpretation. Contrary to Recaséns' view, judicial valuation is immanent in the law and not something transcendental. That judges do make law needs to be explained to the Latin American in view of the dominant rationalism which Cossio attacks. He furnishes a satisfactory philosophical justification for this fact of human experience, and it will undoubtedly be influential in the long run in the improvement of opinions and, as he hopes, in the improvement of the quality of the judiciary.

The Uruguayan contribution by Llambías de Azevedo, despite its appalling title, *The Eidetics and Aporetics of The Law,* and the difficulty of its initial pages, is in this reviewer's opinion, the soundest and most thoughtful in the volume. He discusses at length twelve prime characteristics of positive law, in regard to many of which he differs from the views of Kelsen and Cossio. Summarizing these points, he defines positive law in the aggregate as a bilateral and retributive system of human enactments to regulate the social conduct of any circle of men, not necessarily the State, as a means of realizing the values of the community. He roundly and soundly rejects the identity of state and law. He also rejects compulsion as of the essence of law. It is only the sanction that is coercive. The mission of the philosophy of law is to solve doubts as to the justice of positive law. It will not do to close one's eyes as do the Positivists or to be silent with the Viennese school. Not "here ends" but "here begins" the Philosophy of Law.

Two essays by García Maynez of Mexico complete the volume, *The Philosophical-Juridical Problem of the Validity of Law* and *Liberty as Power and Right.* They are both worthwhile and written, for the most part, in language that can be understood by the average lawyer. If legal philosophers are to help advance the law, they must speak the language of the man in the courtroom. Words that cannot be found in either English or Spanish dictionaries may be current among philosophers, but they are not legal tender in court.

It is a pity that these outstanding Latin Americans, so strongly influenced by German philosophers, should be unaware of Anglo-American writers on jurisprudence. A knowledge of the history and evolution of the common law and of

equity would help them resolve some of their problems. It is not provincial to believe that the common sense of common law judges is entitled to a higher rank in the hierarchy of values than the abstractions of a Kelsen and other Teutonic philosophers and their disciples. On the other hand, adventure in comparative law teaches us that we have much to learn from the clarity and scientific methods of authentic Latin American jurists. It is all the more regrettable, therefore, that public funds and private energy should have been expended on a volume of this character in preference over the many codes and excellent treatises that are clamoring for translation and which would give us a truer insight into the real law of Latin America.

PHANOR JAMES EDER†

CASES ON FEDERAL ANTI-TRUST LAWS—TRADE REGULATION. By S. Chesterfield Oppenheim. St. Paul: West Publishing Co., 1948. Pp. xxxv, 1044. $8.50.

PROFESSOR OPPENHEIM'S division of his 1936 *Casebook on Trade Regulation* into this volume on the anti-trust laws and a forthcoming companion volume on unfair competitive practices presages the divorce of two topics which have been associated in law school pedagogy for a generation.[1] The association seems natural. Monopolistic combination and employment of anti-social competitive tactics against trade rivals are often found together. The same statutes are invoked against both evils: Sherman Act equity decrees commonly enjoin specific predatory practices which have been used as means of achieving or maintaining dominance in an industry; and, conversely, the Federal Trade Commission's control of "unfair methods of competition," which sounds as though it were directed against predatory practices, is regularly invoked against combinations of business men whose sin is not that they compete unfairly, but that they refrain from competing altogether. Despite this overlapping, it needs only a glance at the contents of the standard "trade regulation" casebooks to reveal the wide range of topics embraced in the law of unfair competition which have little to do with monopoly or restraint of trade in the Sherman Act sense. Typical activities dealt with under the heading of unfair competition include unlawful appropriation of a competitor's trade marks and good will, misrepresentation of one's own or a competitor's merchandise, inducing breaches of a competitor's contracts or bribing his employees to betray him.

The marriage of antitrust and unfair competition in our curricula has been an uneasy one. There were those who suspected that it rested on propinquity

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1. The association began with OLIPHANT, CASES ON TRADE REGULATION (1923); see OPPENHEIM, CASES ON TRADE REGULATION 3 (1936); *cf.* HANDLER, CASES ON TRADE REGULATION (1937).

rather than common interests. At Columbia Law School a curriculum subcommittee proposed a separation several years ago. A distinguished economist of great experience in the trade regulation field declared that the materials in the leading casebooks did not have "sufficient coherence to be treated as a single unit."[2] Indeed, the two standard works, Oppenheim and Handler,[3] tended to fall apart in the middle like badly composed pictures. The transition from problems of integration in the coal or steel industry to questions of confusing similarity of trade names was likely to be too strenuous for teachers as well as students. In more than one school where these bifocal books were used the course actually given came to be confined substantially to one subject or the other. Professor Oppenheim now acknowledges that the two traditions have different roots, that laws for the maintenance of a competitive economy hardly raise the same issues as laws restraining fraud, theft and other abuses to which the pressures of competition may force some entrepreneurs.[4] The former is a question of community structure, of the allocation of economic power and responsibility among governmental and non-governmental agencies. The latter is a police problem.

But if the basic significance of the anti-trust laws is their tendency toward decentralization of economic power as the best guarantee of industrial progress and individual liberty, the casebooks of the future will have not only to slough off unfair competition but also to expand into a consideration of the important body of laws which favor centralization of power. The very perception which requires the anti-trust laws to be segregated for study from unfair competition seems also to require that they be studied together with the sanctioned monopolies of patent and public utility franchise; with the laws which create government monopolies in such significant areas as postal service, liquor distribution, atomic energy, and (in England) coal, transport and communications; with the strange new forms of competition between government and private enterprise, as under the Tennessee Valley Authority Act; and with the phenomenon of public subsidies to underwrite the risks of private "venture capital." The full significance of the Robinson-Patman Act requiring price and service equality in interstate sales is exposed if one sees the act as an extension to general commercial activity of standards highly developed in connection with public utility operations.[5] Consideration of the National Recovery Act gives a new perspective to the picture of trade association activity. To neglect the Commodity Clause of the Interstate Commerce Act[6] is to overlook one important solution for problems of discrimination and vertical integration. Only by a study of this scope can one deal comprehendingly with these basic political, economic and

2. Corwin D. Edwards, *The Place of Economics in the Course on Trade Regulation*, 1 LEGAL ED. 1–2 (1948).

3. HANDLER, CASES ON TRADE REGULATION (1937).

4. Pp. 58–59.

5. *E.g.*, §§ 2 and 3 of the Interstate Commerce Act, 24 STAT. 379, 380 (1887), 49 U. S. C. §§ 2 and 3 (1946).

6. 24 STAT. 379 (1887), 49 U.S. C. § 1 (8) (1946).

legal issues of our troubled times: when is planning (by industry cartel or political agency) to be substituted for the automatic control of competitive markets; who then shall plan and what shall be the mechanisms of control?

There are obvious dangers and difficulties in attempting so broad a synthesis as is here proposed. Whole sections of the usual courses in anti-trust or public utility law might have to be drastically compressed in order to accommodate new materials. It would be necessary for the case system of presentation to give way in part to a method which permits more rapid coverage of subject matter. One would have to guard against the temptation to convert trade regulation into a discourse on political economy; the breadth of the proposed inquiry must after all justify itself by cultivating the lawyer's special skill in dealing with legal rules, the inevitably rigid formulae in which policy determinations are embodied. There would be grave danger of superficiality; but this is an inevitable risk in any undertaking to elicit from this world of infinite particulars a manageable pattern of useful generalities. A good legal education must cultivate both the power to make these generalizations and the complementary power to probe intensively into the particulars of the case. A course on the anti-trust laws alone may miss both objectives, being too narrow for successful generalization, yet too comprehensive to permit real mastery of the facts and forces in any one of our basic industries. Despite the difficulties, therefore, it may be worthwhile to seek that deeper comprehension of law as an instrument of economic organization which might be attained by viewing the problem in a setting broader than the anti-trust laws.

Professor Oppenheim has, of course, not essayed this experiment, and these vistas of the possible must not obscure the actuality of his accomplishment in the present work. In the area which he has chosen to explore, he has given us a monumental report, which will be particularly helpful to practitioners and researchers in the field. Surely every significant case or leading article within its scope is registered somewhere in this opus. Lengthy opinions have been condensed with skill. Attention is appropriately concentrated on areas of controversy which have recently received much judicial and legislative scrutiny. Anyone familiar with the actual operation of the anti-trust laws must approve the generous space allowed for consideration of "Remedies," especially the consent decree. This material offers a striking and therefore pedagogically useful demonstration of how a judicial decree can become very nearly a scheme of legislative regulation, tailored to the requirements of a particular industry, and creating for that industry a particularity of prohibition and affirmative command that gives substance to the Sherman Act's denunciation of "restraint of trade."

The treatment is, on the whole, conventional. Despite the inclusion of several textual notes and excerpts from some nonlegal sources, the development is almost entirely by cases. One may contrast, for example, Professor Oppenheim's 129 pages on "Close-Knit Combinations under the Sherman Act"[7] with

7. P. 100 *et seq.*

Professor Handler's textual "Review of the Supreme Court Decisions" in the same field.[8] Opinions may differ also on the selection of auxiliary economic readings. Is it worthwhile indoctrinating law students in the taxonomy of theoretical economics, including definitions of monopsony, duopoly, oligopoly; of competition that can be "perfect," "pure," "imperfect," "monopolistic," "cut-throat" or "predatory"?[9] On the other hand, in discussing mergers and consolidations do we not owe the student at least a summary of the Federal Trade Commission's surprising findings on *Relative Efficiency of Large, Medium-sized, and Small Business?*[10]

My most serious quarrel is with the general plan of organization. Parts II and III are the main branches of the anlysis. Part II deals with "Mergers, Consolidations and Monopoly." Part III, which occupies more than half the book, is entitled "Individual Transactions and Loose Associations under the Federal Anti-Trust Laws, including Selected Non-Federal Precedents." The unifying principle of these main divisions is not easy to detect. The range of Part III, embracing as it does chapters on price fixing, patent pools, tying, boycotts and cartels, suggests that it is simply a compendium of all substantive anti-trust problems not covered in Part II. What then is the distinctive problem of Part II? The bulk of it is chapter four on close-knit combinations, introduced as showing "the development of the rule of reason" and to "illustrate types of combinations which have been proceeded against for violation of the Sherman Act."[11] But the rule of reason has been developed and applied at least as often and as interestingly in cases involving price-fixing contracts and loose associations as in close-knit combination cases. Mere illustration of Sherman Act proceedings hardly offers an adequate standard for selecting, editing or ordering of materials in a single chapter of limited scope. Two of the three cases[12] in chapter five, which is entitled "Monopoly under the Sherman Anti-Trust Act," are also "close-knit" cases. It is hard to find any basis for putting the *Steel* case in one chapter and the *Aluminum* case in another, and still harder to see why the *American Tobacco* case, an example of conspiracy inferred from uniform action on price and other matters, appears here divorced from either the note on price leadership in chapter four or the discussion of loose associations which is reserved for Part III. The "monopoly concept" which purports to give coherence to chapter five, like the rule of reason concept on which chapter four is strung, is too comprehensive a rubric for any single segment of the anti-trust analysis.

Part IV on Remedies illustrates the conflict between teaching tool and practi-

8. Handler, *op. cit. supra* note 1, pp. 387 *et seq.*

9. TNEC Monograph 21 (1940), quoted in the Casebook at p. 71.

10. TNEC Monograph 13 (1941), which is merely cited along with other references at page 83 of the Casebook.

11. P. 100.

12. United States v. Aluminum Co. 148 F. 2d 416 (2d Cir. 1945); United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943); American Tobacco Co. v. United States. 328 U. S. 781 (1941).

tioner's handbook that occasionally manifests itself. The consent decree, dissolution, and treble damage suits are topics certainly to be taken into account in a scholarly inquiry into the monopoly laws. But these are interspersed with sections of little pedagogic value on immunity of witnesses, intervention, counterclaim, res judicata and statute of limitations. The controlling considerations and traditions on these questions are largely independent of the substantive issues of economic organization upon which the book focuses, and a student could of course acquire only the most superficial notions on these points from this fragmentary anti-trust gloss. Query also whether two cases like *United States v. Borden Co.*[13] and *Parker v. Brown*[14] are most effectively employed in a subdivision of the Remedies chapter entitled "Defenses—Implied Statutory Exemption." This suggests an approach to them as exercises in the dialectic of statutory interpretation rather than as dramatic incidents in two great adjustments taking place in our economic and political structures: (1) the adjustment of state planning in agriculture to a still competitive industrial system, and (2) the correlation of federal and state powers over economic organization.

Yet rearrangement of materials is the privilege, almost the duty, of any teacher capable of an individual interpretation of the phenomena within his ken. The comments on organization therefore do not seriously impugn the merit of Professor Oppenheim's book, which, if nothing else, provides convenient access to an important body of law and constitutes a solid, if unspectacular, advance in our comprehension of the legal status of monopoly and trade restraint.

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THE MEANING OF HUMAN HISTORY. By Morris R. Cohen. La Salle, Ill.: Open Court Publishing Co., 1947. Pp. 304. $4.00.

In these Carus Lectures delivered by Professor Cohen in 1944, three years before his death, we are privileged to witness one of the keenest, liveliest, most profound and orderly minds our generation has known wrestle "in the field of history, as elsewhere, with such permanent problems as those involved in the reconciliation of the empirical and the rational, the mental and the physical, change and persistence, unity and diversity, value and existence, chance and determination."[1] Since history "unfortunately has not arranged itself to suit the convenience of historians,"[2] the facts of human history,[3] like the facts of

13. 308 U. S. 188 (1939).
14. 317 U. S. 341 (1943).

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1. P. 35.
2. P. 225.
3. For an interesting attempt to answer the question with what facts history is concerned, see SCHRECKER, WORK AND HISTORY (1948). *Cf.* Konvitz, Book Review, Saturday Review of Literature, June 5, 1948, p. 32.

nature and of mind, challenge philosophical enquiry. Professor Cohen was not one to run away from a problem. He noted a "human disinclination and inability" to learn from history as itself constituting one of the outstanding facts of history;[4] but he himself, as these lectures eminently demonstrate, was free from this vice. He brought to bear on the methodological, scientific and philosophical problems that the field of history presents the same great qualities of mind and spirit that he employed when coping with the problems of scientific method in *Reason and Nature*,[5] with the problems of legal philosophy in *Law and the Social Order*,[6] with the problems of logic in *An Introduction to Logic and Scientific Method*[7] and *Preface to Logic*,[8] and with the problems of politics in *The Faith of a Liberal*.[9] One ends *The Meaning of Human History* with a refreshed awareness of the fact that its author was the most encyclopedic philosopher our century has thus far known, a twentieth century Aristotle.

The past, Professor Cohen said, "has left such a mark on the present that in some way it may be said to be always with us." Thus:

> "If a pebble obstructs the growth of a tree and causes a certain division in it, the tree will always bear the mark. So the experiences of youth, the language we have learnt, the manners in which we have been trained, become part of our nature. And so the past laws of a country, its old institutions, and the general traditions which constitute its *ethos* and character are active forces in the present, and in that sense history is a necessary guide for the understanding of the present. . . .[10] The past literally continues into the present. Past conditions, such as old ideas and habits, buildings, fields, and laws, continue to operate. Inertia is the first law of history, as it is of physics. Every event is an integral part of a larger segment of history, and the task of tracing causal connections is the task of discovering those elements that persist through, and despite, the arbitrary cuts by which we mark off the event we are at the moment seeking to explain."[11]

Since the past is with us now, the discovery of the persistent elements in human history is a matter of no small importance. The discovery can be made through investigations that are controlled "by the strictest rules of evidence,"[12] by testing every general proposition through observation and experiment. Historic investigation, to the extent that it involves scientific investigation and verification, "may be properly called scientific."[13] But the investigation also

4. P. 129.
5. Published 1931.
6. Published 1933.
7. Published 1934; written with Ernest Nagel.
8. Published 1944.
9. Published 1946.
10. P. 23.
11. P. 107.
12. P. 32.
13. *Ibid.*

involves imagination, for the historian needs "an imaginative capacity for seeing threads of connection between historic facts and significant issues."[14] The ideal to which the greatest historians have aspired is that of "an imaginative reconstruction of the past which is scientific in its determinations and artistic in its formulation."[15]

There are, of course, subjective factors that "color" all histories. The historian sees things from his chosen perspective, and his selected theory of causation will determine for him the events that are related. "But this is true also within natural science. The presence of assumptions or hypotheses does not vitiate but rather strengthens the argument, provided we recognize these elements for what they are."[16] Social movements can be explained only in terms of constants or identities, and these "connections or identities the historian must find. He does not create them."[17] If the meaning of an event is found in its relations to other events with which it is connected, "the meaning of history is not created by the historian but discovered by him." What the historian makes is "not the past but findings about it." [18]

These findings, however, should not be in terms only of constants. Nature and history show events that are "accidental of fortuitous coincidences."[19] There is relative necessity and also contingency in history, for these terms are always relative to a selected system that is finite or limited in perspective. It is the same with human events as with physical happenings; their necessity is conditional, for "no event is necessary absolutely or by itself, but only in so far as it is connected with other events and is thus part of a system."[20] Since we may be living in a really pluralistic world, we have accidents when two relatively independent streams of causality meet and their meeting is not deducible from either alone or from the two together.[21] The historian should not try to expunge from the history he is writing "the notion of accident as the coincidence of independent streams of events."[22]

Since the world may be really pluralistic, no single factor or account (political, religious, economic, psychologic, etc.) can give us a complete explanation of the historic process. A purely political, religious or economic account is only a partial story; it can never give us the fundamental interpretation. "General history must work with a number of factors rather than with only one."[23] The monistic approach makes its appeal by reason of its simplicity and apparently definitive character, "but easy simplicity is an evasion rather than a solution of difficulties."

14. P. 33.
15. P. 34.
16. P. 28.
17. P. 107.
18. P. 49.
19. P. 90.
20. P. 109.
21. P. 110.
22. P. 111.
23. P. 228.

Professor Cohen arrived at these conclusions only after a painstaking examination of the leading monistic philosophies of history, which he discussed in chapters devoted to the geographic, biologic, institutional, and "great men" approaches in the writing of history. These chapters are among the most impressive and valuable in the book.

Toward the end of book Professor Cohen permitted himself to state some conclusions suggested by his life-long study of history. While he apparently failed to find sufficient time for their elaboration and for testing their verification, he considered them sufficiently significant to state them.

"To my mind," he said, "the idea of polarity and oscillation between opposite poles has a good deal more to contribute to historiography than the notions of perpetual progress or perpetual degeneration."[24] The dominant forces in human nature which seemed to him relevant for an understanding of history are "the expansive forces, which involve adventure, and the centralizing or organizing forces, which protect us against those elements that would destroy us. Fear and freedom are thus two poles of human life. Without freedom to expand or grow life would become impossible, but without fear, which leads us consciously or unconsciously to guard against danger, life would soon be destroyed."[25] Human history is full of human failures, brutalities and stupidities; human tragedies fill the pages of history. But despair and cynicism need not follow from this. Knowledge of the truth "is in the end the only truly liberating and thus ethically sustaining force."[26] The expansive and centralizing forces in life,—the principle of polarity—are the basis of hope which sustains human life. Brute power has defeated many good causes, but history shows "that good causes are more often defeated by negligence in the pursuit of the right than by positive forces of evil; and while it is true that brute power can for a limited time crush the human spirit, history also shows that the spirit of truth has a superior vitality and thus truth, even though for a time crushed to earth, rises again."[27]

One may ask the question whether Professor Cohen could, if challenged, have proved the proposition that history shows that the spirit of truth has a superior vitality. Perhaps this is the sort of proposition that can neither be proved nor disproved. Indeed, Professor Cohen himself has said that "history cannot prove any moral rules";[28] yet, if history shows the superior vitality of truth, why can it not also show the superior vitality of goodness, which itself may be defined as a species of truth? Professor Cohen speaks of the "fundamental truth" of the saying of Jesus: "What is a man profited, if he shall gain the whole world, and lose his own soul?"[29] Is this a "fundamental truth" of physical nature or of the moral nature of man?

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24. P. 273.
25. *Ibid.*
26. P. 293.
27. P. 296.
28. P. 289.
29. P. 296, quoting Matt. XVI:26.

If pressed, I suspect that Professor Cohen would have admitted that he believed in the superior vitality of truth in human history as an article of faith. Faith *can* move mountains. A man's view of what is happening is itself a cause of what happens. "You cannot," said Professor Cohen, "rule human purposes and knowledge out of human life and history. The belief that we are victorious . . . influences our conduct."[30] Had he not believed in the superior vitality of truth, Cohen could not have been the great teacher that he was for over forty years.

"To widen our horizon," said Professor Cohen, "to make us see other points of view than those to which we are accustomed, is the greatest service that can be rendered by the historian."[31] When history is studied with an ethical interest, he said, it will widen our experiences and horizons, "like intelligent visits to foreign countries or conversing with great and unique personalities. Our problems may not thereby be solved, but they are illumined."[32] Has he not in these statements concerning the role and utility of historians in fact stated his own function and significance as a philosopher? One finishes the book with a consciousness that one has enjoyed the inestimable privilege of a conversation with a great and unique personality, that one has visited remote "places of nestling green for poets made."[33]

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THE ROOSEVELT COURT. By C. Herman Pritchett. New York: The Macmillan Company, 1948. Pp. xvi, 314. $5.00.

THE ROOSEVELT COURT is the fourth in what promises to be a long series of popular essays to resolve the enigma of a Court moulded by a single President but reflecting the many divergent views that contributed to the long tenure of the New Deal. Thus far we have had an analysis by a journalist,[1] a lawyer,[2] and an historian.[3] None of these has satisfied the partisans.[4] Professor Pritchett's perspective is that of a political scientist-statistician, albeit a "statistician, misled by the fallacy of supposing all cases to be equally important."[5] And, although I trust that my reasons are not partisan,[6] it does not satisfy me.

30. Pp. 119–120.
31. P. 28.
32. P. 291.
33. Leigh Hunt, *The Story of Rimini* (1816).

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1. MCCUNE, THE NINE YOUNG MEN (1947).
2. CURTIS, LIONS UNDER THE THRONE (1947).
3. Schlesinger, *The Supreme Court, 1947*, Fortune, January 1947, p. 78.
4. See, *e.g.*, Book Reviews, 56 YALE L. J. 1458 *et seq.* (1947).
5. COHEN, THE FAITH OF A LIBERAL 21 (1946).
6. In order that the reader may establish his "bias against bias" (Hand, *Thomas W.*

The inspiration for this "full-scale inductive and statistical inquiry into the nature and operation of the process of judicial decision making"[7] is attributed to Lord Kelvin's maxim: "When you cannot measure, your knowledge is meager and unsatisfactory."[8] Perhaps Professor Pritchett should have read further among the English physicists before attempting the statistical analysis. He might then have discovered that there are matters beyond measurement even by the magic of mathematics.[9] And a fortunate discovery it might have been; Professor Pritchett's textual material is always interesting and often valid, but his statistics seldom partake of either of these attributes.

The proclivity of the Justices of this Court toward writing concurring and dissenting opinions provides grist for Professor Pritchett's statistical mill. Except for Mr. Justice Frankfurter's avowed belief in individual opinions restrained only by the "volume of the Court's business,"[10] however, he, no more than his predecessors, is able to explain this phenomenon. Pritchett does suggest that this mass production of opinions might be caused by an attempt to emulate the great dissents of Holmes, Brandeis and Cardozo. But the members of the Court are certainly aware that in a number of cases the "great dissenters," disagreed with the majority, but failed even to indicate their dissent.[11] (If the approach of the book were psychological rather than statistical, the author might look to the fact that many of the Justices prior to their appointments had been accustomed to the role not only of first violin but of concertmaster; second fiddle becomes a very difficult instrument to play under such circumstances. But it is more likely that no single explanation exists; each of the Justices has his own reasons for writing non-majority opinions.) Whatever the cause, the non-unanimous opinions are legion. And the author's major assumption is that these "non-unanimous opinions admit the public to the Supreme Court's inner sanctum."[12]

It is apparent that Professor Pritchett's entree to the "inner sanctum" is only by means of these opinions. But it is this very distance from the Court that lends to the book an objectivity often absent in similar critiques. Ob-

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Swan, 57 YALE L. J. 167, 172 (1948)), I must state that a part of my legal apprenticeship was served as Law Secretary to Mr. Justice Frankfurter.

7. P. xiii.

8. P. xi.

9. *E.g.*, JEANS, PHYSICS AND PHILOSOPHY 15–16 (1943). Professor Pritchett admits an awareness "of the limitations of statistical methods in dealing with materials of the kind involved here. The greater precision and certainty which such methods appear to yield may, under the circumstances, be in part illusory. Nevertheless, I am convinced that the counting and charting have a positive contribution to an understanding of the motivations of the present Court." P. xv.

10. Mr. Justice Frankfurter, concurring, in Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 487 (1939). See also Frankfurter and Landis, *The Supreme Court Under The Judiciary Act of 1925*, 42 HARV. L. REV. 1, 15–16 (1928); *The Supreme Court at October Term 1928*, 43 HARV. L. REV. 33, 47 (1929).

11. See, *e.g.*, the interesting comment of Mr. Justice Holmes on *"voting* the other way" in 2 HOLMES-POLLOCK LETTERS 58 (Howe ed., 1942).

12. P. xii.

jectivity, however, is not enough; accuracy too is a requisite. But Professor Pritchett's statistics are distorting mirrors rather than true reflectors. In addition to treating cases as "fungibles," his categorizations as "left" or "right" depend solely on whether a Justice has voted for or against "labor," "civil liberties," administrative agencies, release of the convicted, corporate taxation, state regulation of business, etc. Neither the merits of the cases nor the reasoning of the opinions affect these statistics. In spite of the multitude of opinions, the charts record only votes, in the manner of the voting machine. It is as if, like the courts of ancient Greece, only ballots were cast and no opinions written.

Even on the basis adopted by the author, however, it is difficult, in many cases, to determine which segment of the Court is "right" and which is "left." For example, it would be interesting to learn which of the factions of the Court in the *Elgin* case[13] the author termed "left," especially in view of the support of the dissent expressed by the *amicus* briefs of the labor unions and the Government. I should like to learn also how Mr. Justice Murphy's record on "civil liberties" can be considered spotless[14] in spite of his majority vote in the *Everson* case,[15] for Professor Pritchett would seem to have read Mr. Justice Rutledge's dissenting opinion. The end product—the charts—is available for perusal, but the contributing factors are carefully out of sight.

Again, Professor Pritchett's categorizations lead to error. Why, for example, are questions of search and seizure issues of "crime and punishment" and not "civil liberties"? Which is more indicative of a police state, the destruction of rights of privacy or the refusal of the privilege to use the mails at low cost? The categorization in this book would indicate the author's belief that the latter is the more fundamental.

If the text is less vulnerable than the charts, it nevertheless reveals many chinks. Professor Pritchett's theme here is that the Court is "a political institution performing a political function."[16] Whether he means by this that the Court's constitutional opinions reflect the social pressures of the community,[17] or that each Justice casts his vote on the basis of his personal preferences as do legislators,[18] is not clear. Certainly the former is a valid function of the judiciary in a constitutional democracy; the latter is not.

On the constitutional level, Professor Pritchett accurately reports a unanimity of policy in dealing with federal statutes. Only two congressional enactments have been declared unconstitutional,[19] and neither was of wide im-

13. Elgin, Joliet & Eastern Ry. v. Burley, 325 U.S. 711 (1945), 327 U.S. 661 (1946).

14. Mr. Justice Murphy "has a 100 per cent record in upholding civil liberties since 1941." P. 259.

15. Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947).

16. P. xiii. This statement is quoted with approval from Professor Konefsky.

17. *Cf.* Mr. Justice Frankfurter concurring, in Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 466 (1947).

18. P. 19.

19. Tot v. United States, 319 U.S. 463 (1943); United States v. Lovett, 328 U.S. 303 (1946).

portance. Different criteria are used in dealing with state statutes, though both "left" and "right" agree in theory that the states are to be inhibited as little as possible. The "left" side of the Court sets off the area of freedom for state regulations primarily in matters of economics while the "right" is more restrictive of possible infringements on the national realm of commerce. On the other hand, the "left" is very restrictive of the states where "personal liberties" are involved while the "right" gives much leeway in this sphere. Nevertheless, both claim to be following the dictates of Mr. Justice Holmes' judicial philosophy. For example, Mr. Justice Black and Mr. Justice Jackson have each recently invoked Mr. Justice Holmes' opinion in *Baldwin v. Missouri*[20] as his guide for action in construing the Fourteenth Amendment.[21]

The revealed differences are differences in judgment not in policy. The test will come, however, when the state legislation restricting organized labor comes before the Court. Theoretically the "left," if consistent, will have to permit the states the same scope here as had been granted them in regulating business. But an articulated judicial philosophy may give way to an inarticulate premise, and the "rights" of labor may be placed in the amorphous category of "civil rights," beyond limitation by the states.[22]

It is on the non-constitutional level that Professor Pritchett's textual analysis is strikingly faulty. "Judicial work that claims or wields supremacy over legislation is quite different from judicial work that is confessedly subordinate and interstitial."[23] But Professor Pritchett is unaware of this basic distinction. Thus, for example, in analyzing the *Girouard* case[24] which involved no constitutional issue, he states:

> "For the members of the *Girouard* majority were also aware of the same claims for legislative deference to which Stone yielded, but their concern for civil liberty was strong enough to override them."[25]

In other words, though the Justices knew what Congress intended, they could disregard it. "Legislative deference" and "concern for civil liberties" may be competing considerations where a constitutional question is present; but "legislative deference" must occupy the field where the only issue is the "proliferation of the purpose of Congress."[26] It is this basic misconception of the role of the Court that causes much of the author's misinterpretation of opinions.

Professor Pritchett's book is written for neither the layman nor the lawyer;

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20. 281 U.S. 586, 595 (1930).

21. Mr. Justice Black, concurring in International Shoe Co. v. Washington, 326 U.S. 310, 322, at 326 (1945); Mr. Justice Jackson, in Saia v. New York, 334 U.S. 558 (1948).

22. See Kurland, *The U. S. Supreme Court Docket*, Fortune, November 1948, p. 179.

23. POWELL, MY PHILOSOPHY OF LAW 277 (1941).

24. Girouard v. United States, 328 U.S. 61 (1946).

25. P. 255.

26. For some modern trends in statutory interpretation, see Wolfson, Book Review, 23 IND. L. J. 381 (1948).

its technical references are too overwhelming for the one and insufficient for the other. It should probably be weighed by the audience for which it was intended: fellow political scientists. For the lawyers, however, though Professor Pritchett may have added to their knowledge about the Court, he has not contributed to their understanding of it.

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